No. 95-631

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Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

Petitioner,

—v.—

HARVEY WEINER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent has failed to come to grips with the fact that the decision below concerns an important and recurring issue of federal class action procedure that continues to divide the appellate courts. Unable to counter petitioner's principal basis for review—a profound and mature split among the circuits—respondent claims that a 1988 decision of this Court on an

issue having nothing to do with the question presented here somehow resolved the question in a manner consistent with the decision below. However, contrary to respondent's position, the division among the circuits has remained and, in fact, has deepened since the decision upon which respondent relies, *Marino v. Ortiz*, 484 U.S. 301 (1988). Further, as we show below, the rule urged by respondent is at odds with several decisions of this Court and if allowed to escape review, will have an adverse impact on class action practice.

ARGUMENT

A. The Split Among the Circuits is Real and Growing

Respondent's assertion that the split among the circuits on the question presented does not survive this Court's decision in *Marino v. Ortiz*, 484 U.S. 301 (1988), is simply wrong.

As noted in the Petition, the Ninth Circuit has repeatedly held that unnamed class members may appeal an approval of a class action settlement whether or not they have sought intervention, and, has permitted non-intervening class members to prosecute appeals since *Marino*. *See, e.g., Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992); *see also Matter of VMS Ltd. Partnership Securities Litig.*, 976 F.2d 362, 367 (7th Cir. 1992) (thereby placing Ninth Circuit among circuits that do not require intervention as prerequisite to appeal approval of class action settlement).

The Seventh Circuit has also recently made it clear that it will continue to adhere to its steady line of authority—dating back to *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970)—that unnamed class members have standing to appeal approval of a class settlement even though they have not intervened. In *VMS*, the Seventh Circuit dismissed an appeal because the class member was appealing a post-settlement implementation order, but took pains to note that

"*Research Corp.* would control in this circuit if [the appellant] were appealing the approval of the settlement agreement," as petitioner sought to do below. *VMS*, 976 F.2d at 368.

In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993), the Third Circuit considered an interlocutory appeal by unnamed class members who, in the course of prosecuting their objections to a class settlement, had been denied intervention by the district court. Responding to the class members' concerns that their appellate standing might be challenged if the proposed settlement were later approved, the Third Circuit dismissed the appeal, in reliance on its prior decisions in *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (1971), and *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), that the class members' concerns were misplaced because they had the absolute right to appeal absent intervention. *Carlough*, 5 F.3d at 714.

Finally, as explained in the Petition, the Tenth Circuit, in two post-*Marino* decisions, has taken an intermediate position that has added to the confusion, holding that intervention is required of class members who seek to appeal the merits of the settlement, but is not required of class members who appeal an award of attorney's fees to the class lawyers. *See Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995).

Respondent argues only that *Rosenbaum* "does not withstand close scrutiny," Opp. 10 n.10, but petitioner's disagreement with *Rosenbaum* on its merits only highlights the serious circuit split and the need for review by this Court.[1]

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[1] Respondents' mischaracterization of the circuit split as "neither real" nor "significant", Opp. 2, is, charitably put, misleading. Indeed, since *Marino*, no fewer than four circuits have recognized and discussed the split. In *Rosenbaum*, *supra*, the Tenth Circuit stated:

> The issue whether a class member must intervene to the underlying suit to have standing to challenge approval of a settlement has split the circuits. Compare *Shults v. Champion Int'l Corp.*, 35 F.3d

This brings to four the number of circuits that part company with the decision below. If this case arose out of any of those circuits rather than the Eleventh Circuit, petitioner would be allowed to appeal the district court's $1.25 million fee award, even though he did not formally intervene. Only the Court can impose uniformity on this important question of Federal Procedure.

B. This Court's Decision in Marino Underscores the Need for Review

In *Marino, supra,* this Court held that a consent decree involving a class of African-American and Hispanic police officers could not be challenged on appeal by white officers who were *not* members of the class and who had not intervened in the district court pursuant to Federal Rule of Civil

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1056 (6th Cir. 1994) (requiring intervention); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679-81 (8th Cir. 1992), (same) cert. denied, ___ U.S. ___, 113 S.Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988) (same); *Guthrie v. Evans*, 815 F.2d 626, 628-29 (11th Cir. 1987) (same) with *Carlough v. Amchem Prods., Inc.*, 5 F.3d 707, 713-14 (3d Cir. 1993) (no intervention required); *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 327-28 (7th Cir. 1980) (same). This Court has recently joined the circuits that require intervention by a Rule 23(b)(3) case in order to have standing to appeal the district court's approval of the settlement. *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993).

64 F.3d at 1441-42. *See also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307-08 (3rd Cir. 1993) (discussing circuit split at some length and concluding "it is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of [a settlement]".); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362, 367 (7th Cir. 1992) ("[s]everal circuits . . . have addressed the issue . . . and have reached conflicting conclusions"); *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675, 678 (8th Cir. 1992) (extensive review of case law, concluding that "[t]he circuits are divided on this issue, and some have inconsistent holdings").

Accordingly, any assertion by the Respondents that the division among the circuits is neither real nor significant is without merit and contrary to the circuit courts' own view of the state of the Law.

Procedure 24. 484 U.S. at 304. *Marino* reflects the familiar concept that *non-parties* must seek formal participatory status to assert their interests in a lawsuit. Absent class members, on the other hand, need not employ such mechanisms, since, like the African-American and Hispanic police officers in *Marino*, they are, in effect, already parties to the lawsuit. Indeed, the class notice specifically invited all class members to appear individually or through counsel to state their objections, Resp. App. 45a-47a, and petitioner did so.[2]

While *Marino* does not speak to the question presented, two other decisions of this Court support the position that absent class members need not seek intervention to be accorded the same basic rights and obligations that accrue to the named plaintiffs. First, in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 551 (1974), the Court held that the filing of a class action under Federal Rule of Civil Procedure 23 tolls the applicable statute of limitations for absent class members, as well as the named plaintiffs, because such class members are "parties to the suit." Second, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that the claims of absent class members, just like the claims of the representative plaintiffs, must meet the jurisdictional amount in diversity cases under 28 U.S.C. § 1332. As *American Pipe* and *Zahn* demonstrate, unnamed class members, unlike the outsiders in *Marino*, are already full participants in the litigation, and should not be required to become intervenors to partake in either the advantages or the burdens of class litigation.

We acknowledge that several courts, including the Eleventh Circuit, have read *Marino* to support an intervention requirement for class members who seek to appeal the approval of a class action settlement. But, as explained in Part A above, the deep split in the circuits remains and has deepened since

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[2] Significantly, however, the class notice did *not* advise the class members that they could seek intervention in the action, nor did it tell them that a failure to intervene would bar them from appealing any decision of the district court. Resp. App. 45a-47a.

Marino; post-Marino Circuit decisions have only widened the divisions. In addition, the fact that a number of circuits have taken *Marino*'s intervention requirement for *non-parties* and applied it to class members who are parties to the litigation provides another reason for this Court to grant the petition and to clarify the scope of *Marino* in light of this Court's prior decisions in *American Pipe* and *Zahn*.

C. A Rule Requiring Intervention Poses Practical Problems That Should Be Resolved by This Court.

The ruling of the court of appeals presents practical problems for the administration of class actions that should be resolved by this Court. First, as noted above, intervention under Rule 24 is designed to permit *non-parties* that have demonstrated the requisite interest in the subject matter of the suit to *litigate* the underlying case. Thus, potential intervenors file complaints in intervention, *see* Fed. R. Civ. P. 24(c), setting out the claims against the defendant which they believe are not being adequately advanced by the plaintiffs. In the class action settlement context at issue here, however, the absent class members do not generally want (or have the resources) to litigate the case, and merely seek to challenge a proposed settlement or some aspect thereof, such as the fees awarded class counsel which, if excessive, would unfairly diminish the class member's recovery. *See Rosenbaum*, 64 F.3d at 1440.

Requiring intervention under such circumstances does nothing to protect the interests of the courts or the settling parties. Assuming that absent class members are aware of the intervention requirement, they will file papers explaining the obvious fact that their interests are adverse to the settling parties and that they desire intervention status solely to protect their appellate standing. The district judge may be hard pressed not to grant intervention in such circumstances, since to do otherwise could be tantamount to denying the objector's right to

appeal. In sum, requiring intervention would be more burdensome for both litigants and judges, with no countervailing benefit.

Second, if absent class members are required to intervene, the courts will become enmeshed in questions regarding whether intervention gives the absent class members full party status typically accorded to "regular" intervenors. Thus, for instance, there would be the question whether absent class members—reclassified as "intervenors"—could unilaterally reject the settlement and litigate the case. Once granted intervention status, absent class members would argue with considerable force that their discovery rights should be the same as those of the named parties. These are important substantive questions, but they should not turn on whether the absent class member is an intervenor. To be sure, the courts might read into Rule 24 the possibility of "limited" intervention to absent class members to make sure that their rights to appeal are preserved, but if that is the only purpose, why require intervention in the first place?[3]

Respondent argues that petitioner should not be heard to complain about the fairness of the settlement and class counsel's healthy fee award because petitioner neglected to follow established procedural practice in "failing" to seek intervention. In one sense, of course, that begs the question of whether intervention should be required. Moreover, respondent overlooks a critical factor about the nature of class litigation. Unlike traditional litigation, in the class action settlement context, under Rules 23(c)(2) and (e), hundreds of

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[3] Moreover, because non-intervening absent class members have a right to appear in the district court and present arguments and evidence as to why the settlement should not be approved, Fed. R. Civ. P. 23(c)(2)(C); 1966 Advisory Committee Note to Fed. R. Civ. P. 23(d)(2); MANUAL FOR COMPLEX LITIGATION THIRD § 30.41 (1995), there is a strong argument that requiring absent class members to attain intervention status solely for purposes of appeal is at odds with 28 U.S.C. § 1291's appeal as of right in civil cases.

unrepresented class members are affirmatively invited to file objections and participate in a fairness hearing held pursuant to Rule 23(e). *See* MANUAL FOR COMPLEX LITIGATION THIRD § 41.42 (1995) (Form Order and Motion of Class Action Settlement). This Court has previously expressed grave concern that the rights of unrepresented absent class members not be shortchanged in the rush to dispose of large-scale class litigation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812-13 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Given the customary involvement in class actions of *pro se* class members, unschooled in the nuances of federal procedural practice, there is all the more reason not to create hidden barriers to the exercise of one's appellate rights. These concerns provide another reason for this Court to grant review and resolve the profound division among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

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